In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 80

FEDERAL TRADE COMMISSION, PETITIONER

v.

RHODES PHARMACAL COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

In their brief in opposition, respondents argue (1) that there are no "special and important reasons" for granting the writ, since review of the decision below will not contribute to the clarification of the admittedly important question of the permissible scope of review of Commission orders; (2) that a reviewing court has power to modify a Commission order, even though it affirms the Commission's findings; (3) that the court below did not rewrite the order so as to substitute its judgment

as to remedy for that of the Commission; and (4) that the order was so ambiguous as to require modification. We do not disagree with the second point as a general principle, and we have fully discussed the first and fourth points in our petition (pp. 9-11, 14-15). In this brief we will discuss only the third point, namely, whether the court of appeals exceeded the permissible scope of judicial review of Commission orders.[1]

Respondents contend (Br. in Opp., pp. 18, 20) that the changes which the court made in the order did no more than substitute a prohibition against representing that Imdrin would afford "permanent" relief from pain for the provision in the original order requiring respondents to specify that such relief is "temporary," and that such change was "necessary to eliminate the ambiguity and to give effect to the Court's criticism of the Commission's action." If the court's modification had done no more than eliminate the alleged ambiguity, we would not be seeking certiorari. The fact of the matter is, however, that the changes made by the court substantially altered the measure of the relief which the Commission had found necessary to protect the public against respondents' misrepresentations.

As we pointed out in our petition (pp. 11-12), the

[1] We note in passing, however, that respondents' contention that the public health aspects of this case are "indirect, remote and conjectural" (Br. in Opp., p. 6) ignores the Commission's finding (Par. Seven, R. 956) that delay in obtaining necessary medical treatment of arthritis or rheumatism may result in irreparable crippling.

original order prohibited respondents from advertising that Imdrin will have any effect upon severe pains and discomforts, or that it will stop or relieve swelling or stiff joints. Under the terms of the modified order, however, respondents are free to continue making these misrepresentations. And the court made such modification even though it sustained the Commission's findings that such statements are false. This case, therefore, is quite different from *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, and *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, upon which respondents rely, since in those cases the issue was whether some less drastic remedy would suffice to correct the misrepresentations, not whether the misrepresentations should be allowed to continue. Here the issue is whether, if a court affirms Commission findings that certain representations are false, it can nevertheless modify the order so as to permit continuation of those very misrepresentations.

Respondents cite the recent decision in *Dolcin Corporation* v. *Federal Trade Commission* (C. A. D. C., No. 11,700, July 1, 1954) in support of the modifications made in the instant order (Br. in Opp., pp. 6-7, 21-22). We submit, however, that the *Dolcin* case dramatizes the problem of this case and actually supports our position. Dolcin, like Imdrin, is used to treat arthritis and rheumatism, and the two drugs have substantially the same active ingredients. The Commission's order in the *Dolcin* case contains a provision virtually identical

with the provision involved in the instant case (Br. in Opp., pp. 25-26). The modifications made by the court in the *Dolcin* case, however, do not change the substance of the order, but merely remove certain ambiguities. Thus, the modified order in that case specifically enjoins representations that Dolcin will "afford significant relief of severe aches, pains and discomforts [of arthritis and rheumatism] * * * or have any therapeutic effect upon any of the symptoms or manifestations of any such condition [i. e., stiffness and swelling] in excess of affording relief of aches, pains or fever within the foregoing limits" (Br. in Opp., pp. 26-27).

The *Dolcin* case points up the distinction between a modification which merely cures an ambiguity but does not change the substance of the order, and a modification which produces a different order. The modification in the instant case is in the latter category, and is beyond the power of the court of appeals. And the practical result of the two cases is that, although the two drugs have substantially identical therapeutic properties, the manufacturers of Imdrin can continue to make misrepresentations which the manufacturers of Dolcin are properly prohibited from making.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

AUGUST, 1954.

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BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Court of Appeals (R. 973) is reported at 208 F. 2d 382.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1953 (R. 980), and a timely petition for rehearing (R. 981) was denied on January 5, 1954 (R. 989). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Jackson on March 23, 1954, to May 18, 1954 (R. 999). The petition for a writ of certiorari

was filed on May 17, 1954, and was granted on October 14, 1954. The jurisdiction of this Court is conferred by 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in modifying as indefinite or ambiguous an order of the Federal Trade Commission, based on findings which the court sustained, which prohibited representations that a preparation had any therapeutic effect in excess of affording "temporary and partial" relief of minor aches, pains, and fever.

2. Whether, if some modification of the order was warranted in order to make its requirements more definite, the court of appeals erred in rewriting the order in a way that permitted respondents to continue to make representations as to the worth of their product which the Commission had found to be false.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair

methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * * Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript, a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed * * *.

STATEMENT

In August 1949, the Federal Trade Commission issued a complaint (R. 2-8), charging that respondents had engaged in unfair and deceptive acts and

practices in commerce by disseminating false advertisements in connection with the sale of the drug Imdrin as a treatment for rheumatism and arthritis. After extensive administrative proceedings, unchallenged as to regularity, the Commission in October, 1952, issued its findings and opinion holding that respondents had engaged in such acts and practices, and entered a cease-and-desist order.

On petition for review, the Court of Appeals for the Seventh Circuit sustained the findings of the Commission as based on substantial evidence, and affirmed and enforced the Commission's order with the exception of paragraph 1(c) thereof, which it modified. The issues before this Court concern only the validity of these modifications. Respondents did not cross-petition for certiorari.

The facts are summarized below in order to give the context in which the issues before this Court arise.

Respondents advertised Imdrin extensively in newspapers and over the radio (Comm. Exs. 1-32, 37, R. 735-765). Among advertisements which the Commission described as typical (R. 949-951) were ones which contained statements in large bold type such as "Amazing New Discovery for Rheumatism, Arthritis" "No Faster Arthritis Pain Relief Known" "Hospital Tested. Stops Swelling, Uncorks Joints, Contains Sensational New Research Discovery" (R. 949) "Resume Confident, Pain-Free Living With Amazing New * * * Imdrin" (E.g., Comm. Ex. 15, R. 746). These newspaper and radio advertisements included such statements as:

If the agony of rheumatic and arthritic pains have been getting you down—if you are racked twenty-four hours a day by torturing aches, beset by swelling, and stiffness—then you know how such conditions can make your job seem twice as hard as it really is. * * * If these unendurable aches and pains are due to rheumatism, start now using safe new Imdrin for quick relief! (Pause) You've read about the wonders of sulfa and penicillin! But you may never before have heard about I-m-d-r-i-n, the brand-new, safe and reliable way to curb pain that is being prescribed by many doctors to bring quick, blessed relief from arthritic pain, stiffness and swelling. Imdrin contains a remarkable research discovery! . . . that not only stops pain, helps reduce swelling, but acts to help uncork the joints! [Comm. Ex. 5, R. 737.]

If you have been suffering tortures of rheumatic and arthritic pains, for days, months, or even years, Imdrin with its amazing new wonder-working ingredient may very well be the answer to your problem of pain-free living . . . Even people who suffered for twenty years were able to live free of pain . . . like happy human beings once again. [Comm. Ex. 8, R. 739.]

Insist on Imdrin for prolonged relief from the pains of arthritis, rheumatism, sciatica, and neuritis [Comm. Ex. 4, R. 737].

Imdrin gives prompt, efficacious, and long-lasting relief [Comm. Ex. 31, R. 763].

The Commission found[1] that "arthritis" and "rheumatism" are general terms, sometimes used interchangeably, which refer to any of a number of diseases or pathological conditions which are characterized by one or more of such symptoms or manifestations as pain, stiffness, and inflammatory and destructive changes in the joints and tissues of the body (Par. Five, R. 954).[2] There is no drug, or combination of drugs, which is an adequate, effective, or reliable treatment for any of the various forms of arthritis or rheumatism (Par. Seven, R. 956). The various forms of these diseases progress and develop differently, and they require different treatment, which varies between different types of such ailments, different individuals suffering from the same ailment, and different stages in the progress thereof (Par. Six, R. 956). Adequate, effective, or reliable treatment for these diseases must be predicated on individual diagnosis, which may require a number of different medical determinations (*ibid.*), and may involve various therapeutic measures, including diet, rest or change of occupation, various types of physiotherapy, surgery, and medication (Par. Seven, R. 956). Delay of needed treatment may result in irreparable crippling (*ibid.*).

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[1] The Commission sustained the findings of the examiner (R. 965).

[2] Among the forms of arthritis and rheumatism are neuritis, sciatica, neuralgia, gout, fibrositis, bursitis, rheumatoid arthritis, osteoarthritis, rheumatic fever, and infectious arthritis (Par. Five, R. 954). One of the expert medical witnesses stated (R. 245) that there are "800 or even more different kinds of rheumatism."

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The Commission further found that the only ingredients of Imdrin, when taken as directed, which have any significant beneficial effect are manganese salicylate and acetylsalicylic acid (commonly called aspirin), the use and effect of which as analgesics and antipyretics has been known for many years (Par. Eight, R. 957). Imdrin, however taken, will not constitute an adequate, effective, or reliable treatment for, arrest the progress or correct the underlying causes of, or cure any arthritic or rheumatic condition; will not ameliorate the aches, pains, and discomfort of any such condition to any extent beyond the temporary and partial relief afforded by its salicylate content as an analgesic and antipyretic; will have no significant effect upon severe aches, pains, and discomforts accompanying such conditions; will afford temporary and partial relief of only minor aches, pains, and discomforts; and, except for such temporary and partial relief, cannot be depended upon to have any effect whatever upon the symptoms accompanying any arthritic or rheumatic condition (Par. Nine, R. 957-958).

The Commission's findings as to the relief from pain afforded by Indrim, which bore out specific allegations in the same terms set forth in the complaint (Par. Four (C)(4), R. 5-6), were based upon the uncontradicted testimony of three of the Commission's expert medical witnesses that Imdrin would provide only "temporary" relief for the various types of arthritis and rheumatism. (Dr. Rosenberg: R. 202, 205, 206, 207, 210, 211;

cf. 218-219. Dr. Barton: R. 255, 257, 258, 261, 263-264, 265, 268. Dr. Wolpaw: R. 309, 310, 311, 312, 314, 316, 317, 318, 320.) Dr. Barton, the only one of the witnesses who defined the term, stated that he used it to mean "a matter of perhaps a few minutes, at the longest an hour, perhaps less" (R. 283), and that the relief which Imdrin would give "conceivably could be up to an hour" (R. 284). Similarly, the Commission's expert medical witnesses, as well as the medical witnesses produced by respondents, all testified that, except in severe cases where it had no effect, Imdrin could be expected to give partial relief or some measure of relief, but that it would not give complete relief. (Dr. Rosenberg: R. 219. Dr. Barton: R. 255. Dr. Wolpaw: R. 309-310. Dr. Weisberg: R. 358. Dr. Black: R. 407.) With respect to the most common form of arthritis, which was described as not a "serious condition" and was commonly self-treated, Dr. Black, one of respondents' medical witnesses, when asked on direct examination whether 20.4 grains of salicylates per day (the dosage recommended for Imdrin) "would tend to diminish the pain and discomforts," testified that this "would be somewhat helpful" (R. 406-407).

In an opinion accompanying its order (R. 960-965), the Commission reviewed the evidence bearing on the beneficial effects of Imdrin and rejected respondents' contention that its order should not prohibit them from claiming that Imdrin afforded in excess of "temporary" relief. The Commission held that such a limitation was necessary in this

case to avoid real danger of deception. It further considered the requirement proper, as against the contention that it is indefinite, since the preparation provides only temporary symptomatic relief and the requirement could be satisfied by any representation showing that lasting relief is not claimed (R. 964-965).

The Commission's cease-and-desist order (R. 958-959) prohibits representation that Imdrin is an adequate, effective, or reliable treatment for, will arrest the progress or correct the underlying causes of, or will cure, any arthritic or rheumatic condition (Pars. 1(a), 1(b)); that it is a new or sensational discovery, or is remarkable, amazing, or sensational (Par. 1(d)); that it will enable severely afflicted persons to resume normal living habits or regular occupations (Par. 1(e)); or that it will have any therapeutic effect upon the functioning of enzyme systems of the blood or bones (Par. 1(f)). These paragraphs of the order are not in issue.

In addition, the order contained a paragraph 1(*e*) which prohibited representations that Imdrin (R. 979):

> . . . will afford any relief of severe aches, pains, and discomforts of neuritis, sciatica, gout, neuralgia, fibrositis, bursitis, or any other arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary and partial relief of minor aches, pains, or fever.

The court of appeals struck this paragraph from the order and inserted in its place a paragraph prohibiting representation that Imdrin (R. 981):

> . . . will afford any permanent relief of aches, pains, and discomforts of neuritis, sciatica, gout, neuralgia, fibrositis, bursitis, or any other arthritic or rheumatic condition, or effect a cure of the symptoms or manifestations of any such condition.

In making this modification, the court stated that Commission orders must not be "indefinite or ambiguous," and referred to two prior decisions[3] in which it had eliminated the word "temporary" from Commission orders relating to drug advertising upon the ground that this word "carries an uncertain meaning" (R. 979-980). The court further

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[3] *D. D. C. Corp.* v. *Federal Trade Commission*, 125 F. 2d 679, 682 (C.A. 7); *Carter Products, Inc.* v. *Federal Trade Commission*, 186 F. 2d 821, 826 (C.A. 7).

stated that it was overwhelmingly established that Imdrin affords relief for the pain and discomfort incident to many rheumatic and arthritic conditions, that the duration of such relief varied with the individual who used the drug, and that the five sections of the order which the court approved "will very largely correct the misleading and deceptive representations which [respondents] have made in their advertisements" (R. 980).

The Commission filed a timely petition for rehearing seeking reconsideration of the revision of paragraph 1(c) ordered by the court of appeals (R. 982-984) which was denied (R. 989).

SUMMARY OF ARGUMENT

I

The word temporary" as used by the Commission to limit representations as to the relief afforded by Imdrin was not in the context of this case so vague and indefinite as to require its elimination from the Commission's order. Respondents repeatedly represented in their advertising that Imdrin afforded "prolonged," "long-lasting," or permanent relief, whereas the Commission alleged, and after extensive hearings found, that the relief, if any, afforded by Imdrin was "temporary and partial." The court of appeals expressly sustained these findings as based on substantial evidence. While the terms "temporary" and "partial" are relative in meaning, they are the terms used by the Commission's medical experts to describe the effect

of Imdrin, which all agreed varied according to the individual and the specific complaint involved.

Most adjectives are relative and gain meaning from their context. The terms in question become indefinite only when one attempts to come as close to the line of misrepresentation as the Commission will permit. "Temporary" does not convey the same meaning as "less than permanent." There is a middle area of representation, connoting a period of duration that is more than temporary and less than permanent. The contrast between words like "temporary" connoting short duration and words like "prolonged" and "long-lasting" connoting long duration is not hairsplitting, but a basic and well recognized contrast of relative terms which are the only terms that adequately convey the meaning intended to be conveyed.

The use of relative terms in Commission orders, which are as specific and meaningful as words can be, has been proscribed neither by Congress nor the courts. The courts of appeals have repeatedly sustained orders containing such relative terms as "temporary," "substantial," "slight," "severe," etc., in situations where, as here, the person subject to the order can have no doubt of the evils complained of and sought to be corrected. In short, the order as entered by the Commission meets the requirement that it "state with reasonable specificity the acts which the respondent is to do or refrain from doing." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 433. The rule itself speaks in terms of "reasonable" specificity, for the requirement of certainty itself is

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relative and will not be permitted to obstruct the fashioning of an order adequate to cope with the unlawful practices found to exist. Any other rule, imposing a requirement of unattainable absolute certainty, would only have the effect of immunizing certain types of misrepresentations from effective administrative control, and thus defeat the purposes of Congress in enacting the Act.

II

Even if some modification of the order was warranted in order to make its requirements more definite, the court of appeals erred in rewriting the order in a way which had the effect of substantially reducing the scope of relief prescribed by the Commission. Under the order as modified, respondents may continue to represent:

> (a) that Imdrin will relieve severe aches, pains, and discomforts;
>
> (b) that Imdrin affords prolonged or long-lasting relief; and
>
> (c) that Indrim will relieve symptoms or manifestations of arthritic or rheumatic conditions other than pain, such as stiffness, swelling, or limitation of motion.

These are the sort of representations respondents made in the past, which the Commission found were false, and the court below explicitly sustained its findings as based on substantial evidence.

Under the statutory scheme, the fashioning of the remedy is a matter entrusted to the Commis-

sion, which "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" shown by the record. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608, 611. While the reviewing court has the power to modify an order of the Commission, "judicial review is limited . . . to ascertain[ing] whether the Commission made an allowable judgment in its choice of the remedy. . . . [The] courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* at 612-613. Patently the Commission's order had a "reasonable relation to the unlawful practices found to exist"; in plain terms it prohibited those very practices.

We agree with respondents that Commission orders must not be unduly drastic, harsh, and burdensome. But respondents have no standing to complain where the order prohibits only representations precisely like those made by respondents in the past which the Commission found were false, and where respondents lose only their freedom to continue to misrepresent the worth of their product.

The facts of this case particularly command application of the rule prohibiting a reviewing court from substituting its judgment as to remedy for that of the Commission. The order dealt with misrepresentations in advertising, the prohibition of which was of peculiar importance to the public health. Misrepresentations that Imdrin will ameliorate stiffness and swelling and afford more than

temporary and partial relief from pain will have a strong sales appeal for the approximately seven million people who suffer from one of the myriad forms of arthritis and rheumatism. Such representations to the extent that they succeed in exciting false hopes in the hearts of the afflicted, with the result that they put off seeing a doctor and delay obtaining proper medical treatment, may, as the Commission found, "result in irreparable crippling".

The court below erred in failing to follow the principle established in the applicable decisions of this Court that the reviewing courts function is limited to ascertaining whether the Commission, as we think it clearly did, made an allowable judgment in its choice of remedy.

ARGUMENT

I

The Word "Temporary" in the Context of This Case Was Not So Indefinite or Ambiguous as to Require Its Elimination from the Commission's Order

Paragraph 1(c) of the Commission's order (R. 959) prohibited representations that Imdrin would "afford any relief of severe aches, pains, or discomforts" or would have any therapeutic effect on the symptoms of any arthritic or rheumatic condition "in excess of affording temporary and partial relief of minor aches, pains, or fever." The court below held that use of the word temporary in this provision was improper in that the word "car-

ries an uncertain meaning" and renders the order ambiguous. (R. 979-980.)

Respondents repeatedly represented in their advertising that Imdrin would give "prolonged",[4] "long-lasting",[5] or permanent relief.[6] The Commission charged (R. 6), and after extensive hearings found, that Imdrin afforded no significant relief of severe pains and that its effect was limited to "temporary and partial" relief of minor pains (R. 958). The court of appeals summarized the Commission's findings by stating "that Imdrin, however taken, will not ameliorate the aches, pains and discomforts of any arthritic or rheumatic condition to any extent beyond the temporary and partial relief thereof afforded by its salicylate content" and "has no significant effect on severe aches, pains", etc., and further held that these findings "are supported by substantial evidence" (R. 976, 979). Thus the prohibitions of paragraph 1(c), as entered by the Commission, find abundant support in the Commission's findings which were sustained by the court below. These findings are controlling and are not open to attack here inasmuch as re-

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[4] *E.g.*, Comm. Ex. 4, R. 737: "Insist on Imdrin for prolonged relief from the pains of arthritis, rheumatism, sciatica, and neuritis." To the same effect, see Comm. Ex. 3, R. 736; Comm. Ex. 6, R. 738; Comm. Ex. 7, R. 738.

[5] *E.g.*, Comm. Ex. 31, R. 763: banner heading "Fast long-lasting relief," followed by text, "It will be found that Imdrin gives prompt, efficacious, and long-lasting relief." See also Comm. Ex. 37, R. 765.

[6] *E.g.*, Comm. Ex. 1, R. 735: "Imdrin . . . the brand new, safe and reliable way to cure pain." Comm. Ex. 10, R. 741: "Resume confident pain-free living with amazing new Imdrin."

spondents have not cross-petitioned for certiorari. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 431.

While the terms "temporary and partial" are relative, they are the terms used by the Commission's medical experts and obviously were considered by them to be apt and meaningful terms to describe the effect of Imdrin which all the witnesses agreed varied according to the individual and the specific complaint involved.

Most adjectives are relative and gain meaning from the context in which they are used. In the context of this order and in the light of the testimony adduced at the hearing, respondents can have no real doubt as to the meaning of the words used by the Commission. Paragraph 1(c) of the order is simple and unambiguous. Respondents can comply by "merely being accurately true in [their] advertisements," *Edward P. Paul & Co.* v. *Federal Trade Commission*, 169 F. 2d 294, 296 (C. A. D. C.), *i.e.*, by representing that Imdrin will give only "temporary and partial" relief. The fact that it may be difficult for respondents to determine whether more extravagant claims would run afoul of the Commission's prohibition is no reason to invalidate the order. The terms in question become indefinite "only when one attempts to come as close to the line of misrepresentation as the Commission will permit." *Id.* at 296.

"Temporary" does not convey the same meaning as "less than permanent". There is a middle area of representation, connoting a period of duration

that is more than temporary but less than permanent. *Webster lists, as antonyms of "temporary,"* the words "permanent" and "enduring." The latter provides the appropriate reference. The meaning to be conveyed is that associated with relatively short but inherently indefinite duration. Roget, with reference to the problem of indicating indefinite duration, sets forth two major classifications, No. 110 containing words like "prolonged," connoting *long* duration, and No. 111 containing words like "temporary," connoting *short* duration. Thus the contrast between "temporary" on the one hand, and more than temporary while less than permanent on the other, is not "hairsplitting" (Br. in Opp. 18), but a basic and well-recognized contrast of relative terms which are the only terms which adequately convey the meaning which is intended to be conveyed. One of the important purposes of the Commission's order in this case is to protect the public from continuing exposure to the customer-seducing claim that the relief afforded by Imdrin, although it may not be permanent, is more than temporary.

The use of relative terms in Commission orders, which are as specific and meaningful as words can be, has been proscribed neither by Congress nor the courts. On the contrary, the courts of appeals, including the court below, have repeatedly sustained orders containing such relative terms as

"temporary,"[7] "substantial,"[8] "slight,"[9] "simi-

[7] See *Fairyfoot Products Co.* v. *Federal Trade Commission*, 80 F. 2d 684, 685 (C.A. 7) (representation that a bunion remedy has any effect other than that derived from a mechanical device which "temporarily relieves pain"); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 111 F. 2d 889 (C.A. 7) (for order see 28 F.T.C. 934, 950) (representation that a product has any therapeutic effect except to the extent of a laxative, "temporarily relieving constipation"); *Sebrone Co.* v. *Federal Trade Commission*, 135 F. 2d 676, 679 (C.A. 7) (representation that product would provide more than "temporary" relief from dandruff or body odor); *Concrete Materials Corp.* v. *Federal Trade Commission*, 189 F. 359 (C.A. 7) (for order see 46 F.T.C. 152, 161) (representation that product would water-proof masonry to any extent other than "temporarily sealing" the pores thereof). But cf. *Dolcin Corp.* v. *Federal Trade Commission*, decided July 1, 1954 (C.A.D.C.)

[8] See *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 111 F. 2d 889 (C.A. 7) (for order see 28 F.T.C. 934, 950) (using word "pepsin" to describe product without sufficient pepsin "to possess substantial therapeutic value" by reason thereof); *De Forest's Training, Inc.* v. *Federal Trade Commission*, 134 F. 2d 819, 820 (C.A. 7) (representation that there are employment possibilities for students or graduates of a school "until substantial numbers" of such students or graduates can be employed); *Philip R. Park, Inc.* v. *Federal Trade Commission*, 136 F. 2d 428 (C.A. 9) (making certain representations concerning named products "or any other product of substantially similar composition or possessing substantially similar properties"); *Edward P. Paul & Co.* v. *Federal Trade Commission*, 169 F. 2d 294, 296 (C.A. D.C.) (representations with respect to products "made in substantial part" in Japan); *Gold Tone Studios, Inc.* v. *Federal Trade Commission*, 183 F. 2d 257 (C.A. 2) (using certain words to refer to a business "not substantially engaged" in using certain processes).

[9] *Consolidated Royal Chemical Corp.* v. *Federal Trade Commission*, 191 F. 2d 896, 900 (C.A. 7) (representation that product would have therapeutic effect more than "in a slight degree"); cf. *Lekas & Drivas, Inc.* v. *Federal Trade Commission*, 145 F. 2d 976 (C.A. 2) (court modified order by adding provision permitting representations that it had "a possible slight value as a laxative").

lar," [10] "reasonably," [11] "severe," [12] etc., in situations where, as here, the person subject to the order can have "no doubt of the evils complained of and sought to be corrected." *Zenith Radio Corp.* v. *Federal Trade Commission*, 143 F.2d 29, 31 (C.A. 7); cf. *Brady Transfer & Storage Co.* v. *United States*, 80 F. Supp. 110 (S.D. Iowa), affirmed per curiam, 335 U.S. 875; *Consolidated Flower Shipments, Inc.* v. *Civil Aeronautics Board*, 213 F. 2d 814, 818 (C.A. 9). Particularly pertinent is the statement by the court below in *Consolidated Royal Chemical Corp.* v. *Federal Trade Commission*, 191 F. 2d 896, where it rejected the contention that the Commission's order was "so vague as to make understanding and compliance impossible." The court stated (191 F. 2d at 900):

> This complaint is addressed to paragraphs b. and c. which prohibit advertising which would indicate that the preparation would do more than "aid in a slight degree." The prohibitions containing this phrase seem quite clear and were based on expert testimony. If

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[10] *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404, 408 (C.A. 7) (representations relating to public offer sales and "similar project[s] or activit[ies]"); *Philip R. Park, Inc.* v. *Federal Trade Commission*, *supra*, note 8.

[11] *Zenith Radio Corp.* v. *Federal Trade Commission*, 143 F. 2d 29, 31 (C.A. 7); for order, see 35 F.T.C. 579, 586 (representation that radios were capable of providing "reasonably audible and distinct reception of foreign broadcasts").

[12] *Dolcin Corp.* v. *Federal Trade Commission*, decided July 1, 1954 (C.A. D.C.) (representation that product will "afford significant relief of severe aches").

> the preparation will only aid *in a slight degree*, the petitioner's advertising was properly limited to such a claim. While this may considerably hamper the style of petitioner's advertising department, that is the fault of petitioner's preparation and not of the Commission's order. [Italics in original.]

The problem confronting the Commission in this case is but an instance of the general problem arising with respect to the false advertising of proprietary remedies. The experience of the Commission has been that manufacturers of such remedies frequently present them to the public, as respondents did here, as amazing new remedies for this or that, and seek to convey the impression that those who are suffering the ills mentioned need have no further concern because medical science has at last produced a long-needed panacea which will bring them instant relief. All too frequently it turns out that the claims made are exaggerated. Remedies like Imdrin, which relieve the symptoms rather than the causes of the ill, seldom give permanent relief. Indeed, they seldom offer more than temporary relief, which varies as between individuals and as between various complaints. Where the respondents have indulged in gross exaggerations, the Commission is confronted with the problem of framing an order which will put an end to the sort of misrepresentations found to have been made. In such cases, the limitations of language being what they are, the Commission frequently has

no real alternative to the use of a relative term like "temporary" and frequently has used that term in its orders.[13] As the Commission explained in its opinion in this case (R. 964-965):

> The Commission is of the opinion that advertising claims should always be so limited where only temporary relief is afforded unless by the very nature of the claim, there is no real danger of deception. The danger of deception in this case lies particularly in the fact that respondents desire to represent that their preparation will afford relief from pains due to a particular cause, namely, pains of arthritis and rheumatism. By limiting the type of pain relief claimed, respondents imply that a lasting relief will be achieved by eliminating the cause of the pain.

The specificity required of an order, if it is to be effective, necessarily depends upon the particular evils at which it is directed. In the Imdrin order the word "temporary" is appropriate to describe

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[13] *E.g., A. P. Durham*, 46 F.T.C. 346, 360; *Atlantic Research Foundation, Inc.*, 46 F.T.C. 558, 567; *Walter M. Jakway*, 46 F.T.C. 836, 845; *Frederick Godfrey*, 47 F.T.C. 193, 202; *Sterling Drug, Inc.*, 47 F.T.C., 203, 214; *W. L. Hopperstead*, 47 F.T.C. 247, 257; *Martin W. Pretorius*, 47 F.T.C. 449, 514; *National Toilet Company*, 47 F.T.C. 1023, 1029; *William A. Reed Company*, 48 F.T.C. 220, 233; *Warren W. Burgess*, 48 F.T.C. 1199, 1211-1212; *Norlon Corp.*, 48 F.T.C. 1273, 1286; The *Elmo Company, Inc.*, 48 F.T.C. 1379, 1393; *Reliance Pharmacal Co.*, Docket No. 5712, order dated July 13, 1953; *Pruvo Pharmacal Co.*, Docket No. 5778, order dated May 15, 1953; cases cited n. 7, *supra*.

the only relief which Imdrin was found to provide. In short, the order as entered by the Commission, meets the requirement that it "must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 433; see *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 726. Even the statement of the rule by this Court, it will be noted, speaks in terms of "reasonable" specificity, for the obvious reason, we think, that the requirement of certainty itself is relative and will not be permitted to obstruct the fashioning of an order adequate to cope with the unlawful practices found to exist. Any other rule, imposing a requirement of unattainable absolute certainty, would only have the effect of immunizing certain types of misrepresentations from effective administrative control, and thus defeat the purposes of Congress in enacting the Act.

In eliminating the word "temporary" from the order, the court below relied on its decisions in *D.D.D. Corp.* v. *Federal Trade Commission*, 125 F. 2d 679, 682, and *Carter Products, Inc.* v. *Federal Trade Commission*, 186 F. 2d 821, 826. The *D.D.D.* case involved an order prohibiting representations that a product for which, as here, the respondent had made extravagant claims in its advertising, had any therapeutic effect upon itching "in excess of affording temporary relief from the symptom of itching." A majority of the court thought that the words "relief from itching" could "carry no im-

plication to the public that the product was a permanent cure either for the symptom or the disease." We think that this decision was wrong and should not be followed for the reasons stated by then Circuit Judge Minton in his dissenting opinion. Those reasons are directly apposite to the situation presented by this case (125 F. 2d at 682-683):

> In my opinion, the word "temporary" should remain in the order of the Commission. The representation is that petitioner's product relieves itching. Permanently? Certainly not. There is no dispute in the evidence that it does not relieve permanently. The evidence is that the relief lasts just as long as the nerves in the vicinity of the application are anesthetized. "Temporary" describes that condition. Webster defines "temporary" as meaning "Lasting for a time only, not permanent, transitory, as temporary relief."
>
> *Unless the effect of petitioner's product is limited by the word "temporary" the relief given is not accurately described.* I do not believe the word "relief" means permanent relief alone, but I do think that without the modifying word "temporary" used with the word "relief," you do not accurately describe the relief petitioner's product gives. It seems to me to work no hardship upon a business concern that wants to be fair in its dealings with the public to require it so to construct the wording of its

advertisements as to describe accurately the virtues of its product. [Emphasis added.]

The *D. D. D.* case was followed in *Carter Products*, which involved an order prohibiting representations that an under-arm deodorant would be more than "temporarily effective." But the expert testimony there was that the deodorant might be effective for up to twenty-four hours, whereas in the instant case the only medical witness who gave his opinion as to the duration of the relief to be expected stated that it "would be a matter of perhaps a few minutes, at the longest an hour" (R. 283). We think that the *D. D. D.* and the *Carter Products* cases should not have been deemed controlling by the court below; we note in this connection that in at least four other cases, decided both before and after these cases, the same court enforced Commission orders containing the word "temporary." [14]

We think that the order of the Commission in this case, considered in the light of the evil to which it was directed, stated with "reasonable specificity the acts which the [respondents are] to . . . refrain from doing," [15] and that the court below erred in holding that paragraph 1(c) thereof should be modified as indefinite or ambiguous.

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[14] See cases cited, n. 7, *supra*.

[15] See *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 433.

II

Even If Some Modification of the Order Was Warranted in Order to Make Its Requirements More Definite, the Court Erred in Modifying the Order in a Way That Substantially Reduced the Scope of Relief Prescribed by the Commission.

While the court purported only to redraft paragraph 1(c) of the order which it considered "indefinite or ambiguous" (R. 979), it did not limit itself to eliminating the language it found objectionable. Instead it rewrote the paragraph concerned in a way which cut the heart out of the prohibitions contained in one of the most important paragraphs of the order and substantially narrowed the scope of relief which the Commission had found necessary to protect the public against respondents' misrepresentations.

The drastic nature of the modifications will appear when it is realized that under the modified order respondents may continue to represent:

> (a) that Imdrin will relieve severe aches, pains, and discomforts;
>
> (b) that Imdrin affords prolonged or long-lasting relief; and
>
> (c) that Imdrin will relieve symptoms or manifestations of arthritic or rheumatic conditions other than pain, such as stiffness, swelling, or limitation of motion.

These are representations respondents made in the past, which the Commission found to be false, and the court below explicitly sustained these findings

as based on substantial evidence. Contrary to the suggestion of the court below (R. 980), and as respondents themselves recognize,[16] false representations such as these are not prohibited by the other paragraphs of the order which the court below approved.

Under the statutory scheme, the fashioning of the remedy is a matter entrusted to the Commission, which "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" shown by the record. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 611. Under Section 5(c) of the Federal Trade Commission Act, the reviewing court has the power to modify an order of the Commission. But as this Court has said, "judicial review is limited . . . to ascertain[ing] whether the Commission made an allowable judgment in its choice of the remedy . . . [The] courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* at 612-613; *Federal Trade Commission* v. *A. P. W. Paper Co.*, 328 U. S. 193, 203-204; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 473; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67. Cf. *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90, 118. Patently the order here has a "reasonable relation to the unlawful practices found to exist"; in plain terms it prohibited those very practices.

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[16] Memorandum in Rejoinder to Petitioner's Memorandum in Reply, p. 3; Brief in Opposition, pp. 18-20.

If the court deemed it necessary to eliminate from the order the word "temporary," not because it bore no reasonable relation to the unlawful practices found to exist, but because it was objectionable as of indefinite meaning, the court was obliged to draft a substitute provision which retained the substance of the prohibitions prescribed by the Commission.[17] If it found this impractical, or if it

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[17] Compare *Dolcin Corp.* v. *Federal Trade Commission*, decided July 1, 1954 (C.A. D.C.). That case also concerned an order prohibiting false advertising of a preparation somewhat similar in composition to Imdrin. The order contained a paragraph prohibiting representations that the preparation would "afford any relief of severe aches, pains," etc., or have any therapeutic effect "in excess of affording temporary relief of minor aches, pains or fever." The Court of Appeals for the District of Columbia revised this paragraph to prohibit representations:

> . . . that said preparation will afford significant relief of severe aches, pains and discomforts or permanent relief of any aches, pains and discomforts of rheumatic fever, firbrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording relief of aches, pains or fever within the foregoing limits.

It will be noted that the court there, while it considered some modification of the order to be appropriate on the record before it, explicitly refused to follow the modification of the Imdrin order as made by the court below (slip opinion, n. 12).

In its petition for rehearing below (R. 982-984), the Commission, while it did not accept the court's reasoning that the word "temporary" should be eliminated from the order, proposed a new draft of paragraph 1(c), consistent with the Court's opinion, which it considered less objectionable than that ordered by the court. The Commission there suggested that paragraph 1(c) might be amended to read (R. 984):

> That said preparation will afford relief from the swelling, stiffness or limitation of motion due to arthritis or

was doubtful as to the scope of the modifications which were appropriate in the light of its opinion, it should have remanded the case to the Commission for reconsideration. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55. But the court could not, under the guise of correcting an alleged ambiguity, "exercise an essentially administrative function" by revising the remedy selected by the Commission to conform to its own views as to the measure of protection which the public interest requires. *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 21; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194.

We have no quarrel with respondents' statement (Br. in Opp., p. 17) that Commission orders must not be "unduly drastic, harsh or burdensome." But the cases upon which they rely in that connection are not pertinent to the problem here presented. In both *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, and *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, the question was whether something less drastic than prohibition of a misleading trade name, namely, the use of qualifying language in connection with such name, might suffice to correct the misrepresentations. As this Court stressed, what was at stake was "a valuable business asset" of the com-

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rheumatism, or from the severe aches or pains of arthritic or rheumatic conditions; or that said preparation will afford permanent relief from any of the aches or pains of arthritic or rheumatic conditions.

panies concerned in the continued use of trade names which had been adopted without fraudulent design and had been used for many years (288 U. S. at 217; 327 U. S. at 612). The Court thought that it might be possible to accommodate "the policy of the law to protect [trade names] as assets of a business" and "the other policy of preventing unfair or deceptive trade practices" (327 U. S. at 612). But here nothing comparable to a business asset is at stake. The order prohibits only representations precisely like those made in the past which the Commission found were false; respondents lose only their freedom to continue to misrepresent the worth of their product.

The facts of this case particularly command application of the rule prohibiting a reviewing court from substituting its judgment as to the remedy for that of the responsible administrative agency. The record shows [18] that pain, stiffness, and swelling are the characteristic symptoms of the various forms of arthritis and rheumatism. Misrepresentations that a drug will ameliorate stiffness and swelling and afford more than temporary and partial relief of pain obviously will have a strong sales appeal for the approximately seven million people in this country who suffer from one of the myriad forms of these diseases in greater or lesser degree. [19]

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[18] (R. 202, 204, 205, 206, 207, 208, 209, 211, 212, 284, 308, 310, 312, 314, 316, 317, 318, 319).

[19] A 1938 study by the United States Public Health Service estimated that there were 6,850,000 cases of rheumatic diseases in the United States. *Primer on the Rheumatic Diseases*, 152

Such representations to the extent that they succeed in exciting false hopes in the hearts of the afflicted, with the result that they put off seeing a doctor and delay obtaining proper medical treatment, may, as the Commission found (R. 956-957), contribute to the crippling growth of the disease. The order of the Commission thus dealt with misrepresentations in advertising, the prohibition of which was of peculiar importance to the public health. Recognizing the inherent importance of the Commission's order in this case, the court below, we submit, should have followed the principle established in the applicable decisions of this Court that the reviewing court's function is limited to ascertaining whether the Commission, as we think it clearly did, made an allowable judgment in its choice of remedy.

Journal of the American Medical Association 323, 324. A recent Public Health survey indicated that in 1951 the number of sufferers probably was even greater. Woolsey, *Prevalence of Arthritis and Rheumatism in the United States*, 67 Public Health Reports 505 507-508. See R. 154-155, 321.

CONCLUSION

The judgment of the court of appeals, in so far as it modified paragraph 1(c) of the Commission's order, should be reversed.

Respectfully submitted,

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